SUPREME COURT, U. S.

No. 38

In the Supreme Court of the United States

OCTOBER TERM, 1947

AGNES M. SAHR, ETC., PETITIONER

v.

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., ET AL.

ON PETITIONS FOR LEAVE TO INTERVENE AND FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE DEPUTY COMMISSIONER (DEPARTMENT OF LABOR)

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Solicitor General,
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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 59

AGNES M. BANKS, ETC., PETITIONER

v.

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., ET AL.

ON PETITIONS FOR LEAVE TO INTERVENE AND FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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On June 5, 1967, the Court invited the Solicitor General to file a supplemental brief in this case, addressed to the bearing of 33 U.S.C. 933(g).

Section 33 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 933, provides that an individual entitled to compensation under the Act who thinks that someone besides his employer is liable in damages to him may bring suit against such third person, and may thereafter obtain a compensa-

tion award under the Act against his employer to the extent that the allowable benefits exceed the third-party recovery. If, however, he merely accepts the compensation award without instituting suit against the third person, all his rights against the third person are assigned to the employer. Furthermore, Section 33(g) of the Act, 33 U.S.C. 933(g), provides that:

> If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation * * * only if such compromise is made with his written approval.

Petitioner's husband, an employee of the respondent Chicago Grain Trimmers Association, Inc., suffered injuries during his employment that resulted in his death. Petitioner instituted a wrongful death action against the Norris Grain Company, claiming that it was responsible for the injuries. After a jury returned a $30,000 verdict in her favor, Norris Grain Company moved the district court to set aside the verdict or to grant a new trial. The district judge ordered that the motion for a new trial stand granted unless petitioner entered in the record a remittitur in the sum of $11,000. Without seeking or obtaining the consent of the Chicago Grain Trimmers Association or its insurance carrier, petitioner accepted the remittitur. Respondent asserts that such acceptance was a "compromise" of petitioner's claim

within the meaning of Section 33(g) which, not having received the written approval of the employer, resulted in the forfeiture of any rights petitioner and her children might otherwise have to compensation. The Deputy Commissioner did not rule expressly on this contention, although he necessarily rejected it since he awarded compensation, deducting from the award petitioner's recovery against the third party. The district court upheld the Deputy Commissioner's award. The court of appeals reversed on the ground that *res judicata* precluded the award of compensation benefits. It did not reach the question whether the award was also barred by Section 33(g). We think it was not.

By its express terms, Section 33(g) is operative only if there is a (1) compromise (2) between an employee entitled to benefits (or his representative) and a third party liable to that employee. Neither of these requirements is satisfied by an order of remittitur. Such an order is an adjudication that damages in excess of a particular amount are not recoverable. See *Arkansas Cattle Co.* v. *Mann*, 130 U.S. 69, 73-74; *Northern Pacific R.R. Co.* v. *Herbert*, 116 U.S. 642, 646-647; 6A Moore, *Federal Practice*, ¶ 59.05[3]. It involves no agreement based on mutual concessions; and certainly it is not the product of agreement between the parties to the litigation. A compromise, on the other hand, does involve an agreement between the parties, and mutual concessions by the parties are an essential element of that agreement. See, *e.g.*, *Lewis* v. *United States*, 17 F. Supp. 543, 546 (D.

Col.), affirmed *sub nom. Sanders* v. *Commissioner of Internal Revenue*, 101 F. 2d 407 (C.A. 10); *Ross Packing Co.* v. *United States*, 42 F. Supp. 932, 934 (E.D. Wash.); *In re Lovel Bldg. Co.*, 116 F. Supp. 383, 385 (D. N.J.).

This distinction has been recognized by the New York Court of Appeals in construing the New York employees' compensation act, upon which the Longshoremen's and Harbor Workers' Compensation Act was based.[1] Confronted with the same question—whether an employee's remittitur without the employer's consent constituted a compromise—the New York court held that a remittitur of $3,000 dollars of a $5,000 judgment did not constitute a compromise. It stated:

> The judgment for $2,000 was rendered in accordance with immemorial common law practice after a full and constitutional jury trial. The optional order of remittitur and the stipulation of plaintiff pursuant thereto did not constitute a waiver of a jury trial. They were integral incidents of a jury trial actually had which eventuated by constitutional practice in a judgment actually entered * * *. *We think the compromise provision of Section 29 of the Workmen's Compensation Law was not intended to apply to the procedure here in question. Plaintiff's stipulation consenting to take that portion of the verdict judicially determined as being not excessive, does*

[1] See *Lawson* v. *Suwannee S.S. Co.*, 336 U.S. 198, 205; H. Rep. No. 1190, 69th Cong., 1st Sess., p. 2 ("The bill follows in the main the New York State compensation law, which is considered one of the best").

not fall within any recognized meaning of the word "compromise." [*Gallagher* v. *Carol Construction Co.*, 272 N.Y. 127, 129, 5 N.E. 2d 63 (1936); emphasis added.]

This ruling is in accord with sound policy and legislative purpose. The purpose of Section 33(g) is to make certain that an employee's independent management of his lawsuit against the third person does not operate to the detriment of his employer. See *Bell* v. *O'Hearne*, 284 F. 2d 777, 780 (C.A. 4). The provision thus presumes that a compromise not consented to by the employer may be prejudicial to him and provides for the forfeiture of compensation benefits to void the prejudicial effect. The danger of a compromised settlement to the employer—that it might understate the third party's liability and so increase the employer's—is not presented by a remittitur, which is a judicial determination, in an adversary proceeding, of the maximum recoverable damages. See *Bell* v. *O'Hearne*, *supra*, 284 F. 2d at 780; cf. *Chapman* v. *Hoage*, 296 U.S. 526, 532; *Weyerhaeuser Timber Co.* v. *Marshal*, 102 F. 2d 78, 81 (C.A. 9). To be sure, where the employee accepts the remittitur, he foregoes the possibility that at a new trial additional evidence might be presented that would result in an award of greater damages which the courts would allow to stand. Such a possibility, however, is "too remote and fanciful to merit consideration." *Bell* v. *O'Hearne*, *supra*, 284 F. 2d at 781. Conduct of an employee toward a third party which is not clearly a compromise within the normally recognized meaning

of that word, even though unconsented to by the employer, will not work a forfeiture of compensation benefits unless the employer is substantially prejudiced. See *Chapman* v. *Hoage*, *supra*, 296 U.S. at 532; *Bell* v. *O'Hearne*, *supra*, 284 F. 2d 780-781; *Weyerhaeuser Timber Co.* v. *Marshall*, *supra*, 102 F. 2d at 81; *Candado Stevedoring Corp.* v. *Lowe*, 85 F. 2d 119, 120-121 (C.A. 2), certiorari denied, 299 U.S. 588. There has been no such showing of substantial prejudice by the employer-respondent.

In sum, the language and purpose of Section 33(g) support the view that a remittitur is not a compromise. Such an interpretation results in no significant prejudice to the employer and is the only reading consistent with this Court's admonition that the Longshoremen's Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Voris* v. *Eikel*, 346 U.S. 328, 333.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JULY 1967.

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